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Case Comment

UNJUST ENRICHMENT AND CONSTRUCTION LABOUR RELATIONS: THE CONTRACTORS' ASSOCIATION AS SELF-SERVING INTERMEDDLER

By JOHN D. McCAMUS*

The prospects of restitutionary recovery for individuals characterized as "self-serving intermeddlers" have been examined on a previous occasion in this Journal.¹ The decision of Mr. Justice Garrett in *Mechanical Contractors Association v. J. G. Rivard Ltd.*² provides an interesting illustration of such recovery and suggests that the unjust enrichment principle may offer a useful solution to a "free-rider" problem arising in the context of the labour relations law of the construction industry. In *Rivard*, a self-serving intermeddler was held to be entitled to *quantum meruit* compensation for the value of certain services which it had rendered. Although the reasons for judgment of Garrett J. appear to suggest that liability was imposed on the basis of an implied contract of some kind, it will be argued here that the proper basis for imposing liability rests on the unjust enrichment principle. The self-serving intermeddler in *Rivard* was a contractors' association seeking a contribution to the costs of maintaining the organization from a recalcitrant contractor on the theory that the contractor had derived benefit from its activities. The funding of such organizations has been a problem in the past.³ In *Rivard*, Garrett J. held that non-members of the Association could be required to contribute a fair proportion of the cost of collective bargaining undertaken by the Association. If the analysis set forth here offers the correct explanation for the result in *Rivard*, this decision could provide a general solution to the financing problems of employers' organizations.

The identifying characteristics of "self-serving intermeddlers" may not be immediately apparent to the reader. This term of art, apparently coined by

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¹ McCamus, *The Self-Serving Intermeddler and the Law of Restitution* (1978), 16 Osgoode Hall L.J. 515.

² (1977), 21 O.R. (2d) 397, 90 D.L.R. (3d) 585 (H.C.). An appeal from this decision was dismissed as an abandoned appeal on April 25, 1978.

³ See Ellis, *Electrical Power Systems Sector Enquiry Report* (unpublished report of an Industrial Inquiry Comm'n., Jan. 31, 1978) at 5-25.

Professor Dawson,⁴ refers to individuals who have carried out a course of action essentially in their own self-interest and in so doing have generated incidental or "spin-off" benefits for other parties. In the typical case, the spin-off benefit has not been requested or sought after by the ultimate recipient. Illustrations of this phenomenon examined in the previous article were: the making of improvements to land by owners with resulting benefit to neighbours or co-owners; the creation of incidental benefits for third parties through the performance of contracts, as where a sub-contractor confers a benefit on the owner of land by performing his agreement with the contractors; the payment of another's debt by one who does so in order to protect his own credit position; and finally, the prosecution of lawsuits which enure to the benefit of others, as where a creditor recaptures assets of the debtor with consequent benefit to other creditors or where an individual successfully litigates a representative claim with resulting benefit to inactive members of the represented class. The general thesis advanced in the article was that claims for recovery against the "free-riders" for the value of benefits received could be supported on the basis of general principles of the law of restitution and that, indeed, the restitutionary interests of the self-serving intermeddler are recognized and protected by a number of well-established rules of law. It has long been accepted, for example, that a creditor who has recaptured an asset of the debtor to the general benefit of all creditors can require the others to contribute to the costs of the successful lawsuit.⁵

The self-serving intermeddler cases provide an illuminating context within which to test the utility of the unjust enrichment analysis as a theory of liability which can explain the results of decided cases which are otherwise difficult to ground in a recognizable theory of liability and, further, offer guidance with respect to as yet uncharted areas of the law. It is an illuminating context for two reasons. First, although these cases give rise to a number of analytical difficulties, their results do conform significantly with the result which would be dictated by an application of the unjust enrichment principle. If these cases are properly characterized as unjust enrichment problems,⁶ restitutionary principles can be useful in identifying anomalous results in the decided cases and in providing an analytical framework for assessing the merits of claims brought in novel circumstances. Secondly, as was suggested

⁴ See Dawson, *The Self Serving Intermeddler* (1974), 87 Harv. L. Rev. 1409.

⁵ See, e.g., *Tootal v. Spicer* (1831), 4 Sim. 510, 58 E.R. 191; *Macdonald v. McCall* (1887), 12 P.R. 9 (Ont.); and additional authorities cited in *McCamus*, *supra* note 1, at 559-63.

⁶ They are explicitly so characterized in much American case law. The fact that the flowering of the unjust enrichment doctrine is more recent in Canada is the explanation, presumably, for the fact that Canadian cases on these issues do not speak the language of unjust enrichment. The absence of explicit unjust enrichment language in the case law does not, of course, mean that these cases ought not be characterized as restitutionary. If the unjust enrichment principle offers a sound theoretical basis for the results in the decided case law, it will be useful to so categorize the cases and to analyze the problems raised in them and in similar fact situations in restitutionary terms. On the significance of explicit judicial recognition of the underlying principles of analytical framework of a "subject" area of the law, see Samek, *Unjust Enrichment, Quasi-Contract and Restitution* (1969), 47 Can. B. Rev. 1.

in the earlier article, the self-serving intermeddler cases operate at the outer limits of the reach of restitutionary analysis. They are for the law of restitution what the negligent misstatement cases are for the laws of tort and contract—an opportunity to examine basic principles of liability in a way which may shape our understanding of their operation in more familiar terrain. More particularly, the general principle of restitutionary liability is that one who has unofficially conferred a benefit on another is entitled to restitution therefor.⁷ The self-serving intermeddler cases provoke careful consideration of the content of the two central concepts of 'officiousness' and 'benefit'.⁸ As far as "officiousness" is concerned, an examination of the cases supports the view that the mere fact that one has acted out of self-interest does not render the conduct 'officious.' True officiousness appears to involve opportunistic, malicious or frivolous intervention in another's affairs. Interventions which are the incidental result of pursuing one's own best interests do not constitute, in the language of the American Restatement,⁹ "interference in the affairs of another not justified by the circumstances." Proper refinement of the 'benefit' concept is a more difficult matter and is, perhaps, of more general significance for the law of restitution. The benefits conferred in these cases have not been requested by their recipients. Accordingly, there is some room for dispute as to whether the benefit in question is one which the recipient can fairly be required to pay for. Where, as in *Rivard*, the benefit takes the form of services, the imposition of liability in effect forces the recipient to make an investment in the acquisition of something he may not have needed or desired for any reason. The determination of the range of situations in which it is appropriate to award restitution for the value of unrequested services has proved to be a difficult and somewhat contentious matter. The self-serving intermeddler cases do lend some support, however, to the proposition that unrequested services should be considered to constitute a benefit for which restitutionary compensation is appropriate where the services are necessary in some sense and therefore constitute an unavoidable expense for the recipient or where the benefit has been transformed into a financial gain or has, in some other way, been turned to account. In these cases the recipient's freedom to invest his own assets as he sees fit is not unfairly circumscribed by the unjust enrichment principle.

In *Rivard* these issues surface in the context of the collective bargaining scheme established under the Ontario *Labour Relations Act* for the construction industry.¹⁰ Under the Act, contractors' associations may seek formal accreditation by the Ontario Labour Relations Board as bargaining agents

⁷ See generally Goff and Jones, *The Law of Restitution* (2d ed. London: Sweet & Maxwell, 1978) at 11-25.

⁸ For a more extended treatment of these questions, see McCamus, *supra* note 1, at 518-22.

⁹ Am. Law Inst., *Restatement of the Law of Restitution* (St. Paul: Am. Law Inst., 1937) at 15.

¹⁰ *The Labour Relations Act*, R.S.O. 1970, c. 232, ss. 106-24, as am. by S.O. 1975, c. 76, ss. 29-34, S.O. 1977, c. 31, s. 3, and S.O. 1979, c. 113.

for all employers¹¹ within a specified geographical area for the purpose of engaging in collective bargaining with construction industry trade unions. Employers within the geographical area are bound by a collective agreement entered into by an accredited association, at least in the sense that the agreement will govern the employer's relationship with any member of the union in question that it employs.¹² This is so whether or not the employer has chosen to become a member of the accredited association. In restitutionary terms, then, the neat point that arose in *Rivard* was whether the Association had unofficially conferred a benefit on a non-member contractor by engaging in a collective bargaining relationship with the union and, accordingly, that a share of the Association's bargaining costs should be recoverable in order to prevent an unjust enrichment of the contractor.

Accreditation schemes of this kind have been enacted by provincial governments in Canada in response to contractor lobbying for the explicit and well understood purpose of enhancing the collective bargaining strength of contractors.¹³ The pre-existing practice of separate bargaining by employers was widely thought to create a serious imbalance in the relative bargaining power of contractors and unions. Contractors bargaining individually provided ample scope for the mounting of a divide and conquer strategy by the unions. Generous agreements could be extracted from vulnerable employers and used as a basis for demanding similar settlements in subsequent negotiations with other contractors. This feature of collective bargaining within the industry may have been a contributing factor in the dramatic wage spiral experienced by the industry in the early 1970's.¹⁴ Although attempts at collective action through contractors' associations had become a familiar feature of bargaining within the industry, the failure of significant numbers of employers to participate in such organizations diminished their effectiveness. Accreditation schemes had as a central objective, then, the strengthening of the bargaining power of the contractors by facilitating the deployment of a collective strategy. Under the Ontario scheme, an employers' association may be accredited only if it enjoys majority support amongst affected contractors.¹⁵ Once accredited, the association has exclusive bargaining rights for all

¹¹ *Id.*, s. 106(c) defines the term "employer" so as to include only those with respect to whose employees a trade union has bargaining rights.

¹² *Id.*, s. 117.

¹³ See generally Dorsey, *Accreditation in Construction Labour Relations* (Halifax: Inst. Publ. Aff., Dal. Univ., 1973), ch. 1. The initial proposal from which these schemes evolved was set forth in Arthurs and Crispo, "Countervailing Employer Power: Accreditation of Contractor Associations," in Goldenberg and Crispo, eds., *Construction Labour Relations* (Toronto: Can. Constr. Ass'n., 1968) 376. For a recent and useful review of Canadian developments, see Brown, *The Reform of Bargaining Structure in the Canadian Construction Industry* (1977), 3 Ind. Rel. L.J. 539.

¹⁴ Although wage spirals were not the exclusive preserve of the construction industry in this period, the spiral in this industry exceeded those elsewhere. See Econ. Council of Can., *Toward More Stable Growth in Construction* (Ottawa: Econ. Council of Can., 1973) s-12, s-13.

¹⁵ The nature of the majority required for accreditation is a numerical majority of employers, provided that they collectively employ a majority of employees employed by employers within the unit. See *supra* note 10, s. 115.

contractors within the unit represented by the association, whether or not they are members of the association. Non-member contractors cannot bargain separately with a trade union. The association is under a statutory duty, however, to fairly represent the interests of both members and non-members in carrying out its mandate.¹⁶

The plaintiff contractors association had been established in 1966. Although the defendant, J. G. Rivard Ltd., was originally a member of the Association, Rivard had resigned its membership in 1967, some six years before the Association successfully sought accreditation under the Act. The plaintiff was accredited by the Board on February 22, 1973 and in March of 1973 it entered into a collective agreement with "Local 71, Plumbers and Sheet Metal Workers of Ottawa" which was binding on all contractors in the Ottawa area, Rivard included. The Association had negotiated collective agreements with Local 71 prior to accreditation in 1968 and 1971. For its part, Rivard had negotiated its own collective agreement with Local 71 in 1968 but in 1971 it had in some manner, according to Garrett J., permitted the plaintiff to "negotiate or to assist in negotiating"¹⁷ a new agreement. Rivard agreed that the Association could negotiate on its behalf in 1973 but stipulated that the terms of the agreement were to be made known to the defendant before it was actually signed.

The Association had attempted to secure its financing by means of provisions included in its corporate by-laws and in the collective agreements it had entered into with Local 71. Members of the Association were required under a corporate by-law (No. 25) to contribute to a so-called industry fund in accord with a formula set forth in a corporate regulation. In an obvious attempt to extract a similar contribution from contractors who are not members of the Association, the Association had also bargained to include a clause repeating this formula in the following terms in each of the 1968, 1971 and 1973 collective agreements with Local 71:

Each employer will contribute 5¢ for every hour worked by a journeyman or apprentice under this agreement. This contribution will be paid by the 15th of each month to the Mechanical Contractors Association of Ottawa in accordance with its By-Law 25 and will be paid through the appointed Trustees or their Administrator.¹⁸

Although the insertion of such clauses is apparently a widespread practice in construction labour relations, it may be noted that this device has some unattractive features both from the point of view of the employers' associations and from the perspective of non-members such as Rivard.

First, while it is understandable that an association might adopt this device as the best possible stratagem for inducing contributions from non-members, it does have the effect of placing the adequacy of association funding on the bargaining table in each negotiation. Although it would be possible

¹⁶ *Id.*, s. 120.

¹⁷ *Supra* note 2, at 401 (O.R.), 589 (D.L.R.).

¹⁸ *Id.* at 399 (O.R.), 487 (D.L.R.).

for the association to extract larger contributions from its own membership than it would be able to negotiate as a term of the collective agreement, this is not a policy which would be likely to swell the membership rolls of the association. Why join the association if this would involve paying a higher level of contribution to the costs of collective bargaining? Secondly, from the non-members' point of view, the device is unattractive insofar as it seeks to extract from them an amount representing more than a fair proportion of collective bargaining costs as opposed to the other costs of the association. Thus there was evidence in *Rivard* that the "industry fund" set up by the plaintiff in its by-laws was used for social, educational, informational and other purposes approved in the by-laws quite apart from its use in financing the Association's collective bargaining effort. The portion of the Association's budget allocated to labour relations activities was said to be 33.18 percent.¹⁹ Moreover, the formula appeared to be yielding a sum in excess of what Garrett J. perceived to be the Association's immediate needs. At the end of December 1976, the Association had accumulated assets, most of which were cash, of \$137,000. To comply with the industry fund clause would require Rivard to make a donation to the funding of activities from which it derived no benefit whatsoever. Garrett J. was evidently quite offended by this feature of the industry fund scheme. To place a clause of this kind in the collective agreement was, in his view, both deceptive and unfair: "[I]t would have been more honest and forthright on the part of the plaintiff to have simply [sic] advised its members and non-members for whom it was negotiating that certain fees were going to be charged by it. . . ."²⁰ Whether this stricture is entirely warranted is doubtful. The insertion of such terms in the collective agreement may well be a lawful exercise of the parties' capacity to settle the terms and conditions of employment.²¹ In any event, it is clear that Rivard was not taken in. Both prior to and subsequent to accreditation, Rivard refused all overtures from the plaintiff to make a contribution to the industry fund either at the full formula rate or at lesser rates suggested by the plaintiff in an attempt to reach a compromise.

Having failed to persuade Rivard to make a contribution, the Association sought legal redress. Prior to undertaking the lawsuit under discussion, the Association had unsuccessfully pursued grievances against Rivard before the Joint Conference Board (the decision of which was approved on review by the Divisional Court) and the Ontario Labour Relations Board.²² Al-

¹⁹ *Id.* at 400 (O.R.), 589 (D.L.R.).

²⁰ *Id.* at 400 (O.R.), 587-88 (D.L.R.).

²¹ *Syndicat Catholique des Employés de Magasins de Que., Inc. v. Compagnie Paquet Ltée.*, [1959] S.C.R. 206, 18 D.L.R. (2d) 346, 1 C.L.L.C. ¶15,409. The Supreme Court of Canada held that a term requiring compulsory check-off of union dues from the wages of employees not belonging to the union could be lawfully included as a "condition of employment" in a "collective agreement" as defined in the Quebec Labour Relations Act. Reasoning by analogy, it appears to be lawful for the parties to agree that employers who employ union labour must contribute to the cost of running the employers association.

²² See *Mechanical Contractors Ass'n. v. J. G. Rivard Ltd.*, [1976] O.L.R.B. Rep. 540.

though the precise nature of these proceedings is not indicated in Garrett J.'s judgment, it is clear that in both instances they constituted attempts to require compliance with the industry fund provision of the collective agreements. The grievance before the Joint Conference Board was brought under the 1973 collective agreement and failed because that agreement did not, in its own terms, provide for the initiation of grievances by the Association.²³ This oversight was remedied in the 1975 agreement under which the grievance before the O.L.R.B. was launched. The Board dismissed the Association's grievance on the basis that the Board's grievance jurisdiction extended only to grievances between the two "parties" to the agreement—the Association (or an employer or group of employers) on the one hand and the union on the other. Although the Act does render collective agreements (including, arguably, industry fund provisions) "binding" on all employers represented by an association,²⁴ there appears to be no effective mechanism established by the Act for the enforcement by employers' associations of obligations under such agreements on non-member employers. Nor does there appear to be any civil remedy available for enforcement of such provisions *per se*. Garrett J. was certainly of the view that these arrangements could not avail the Association: "The plaintiff obviously cannot rely upon the collective bargaining agreement as an agreement by the defendant or anyone in the defendant's position to contribute to the industry fund in that the collective bargaining agreement is not made between the plaintiff and the defendant but between the plaintiff for the mechanical contractors and Local 71."²⁵ Quite apart from this privity concern, however, there are statutory obstacles to civil enforcement which appear to be insurmountable.²⁶

The action before Garrett J. was brought for the recovery of \$11,814.08 in industry fund contributions allegedly due from the defendant.²⁷ The plaintiff offered two different theories in support of the claim, one in contract, the other in *quantum meruit*. The contract claim was disposed of with little difficulty. The reasons for judgment do not indicate the nature of the agreement alleged by the plaintiff. Presumably, the plaintiff asserted that a direct agreement between the plaintiff and the defendant to make such contributions could be implied in the circumstances of this case. In Garrett J.'s view, however, there was no support whatsoever in the evidence for the existence of an agreement "written, verbal or otherwise between the plaintiff as to payment of the industry fund charges."²⁸ The plaintiff could not have entertained

²³ These proceedings are briefly described in the later decision of the O.L.R.B., *id.* at 543.

²⁴ *The Labour Relations Act*, R.S.O. 1970, c. 232, s. 117.

²⁵ *Supra* note 2, at 399 (O.R.), 587 (D.L.R.).

²⁶ *The Rights of Labour Act*, R.S.O. 1970, c. 416, s. 3(3) appears to preclude such relief. Further, s. 117 of *The Labour Relations Act*, R.S.O. 1970, c. 232, only stipulates that the Agreement is binding on non-member employers "for the purposes of this Act" and therefore not, *semble*, for the purposes of civil liability.

²⁷ Although Garret J. does not clearly so indicate, the amount claimed probably represents contributions to the fund for the entire period from negotiation of the 1968 agreement through to the expiry of the 1973 agreement in 1975.

²⁸ *Supra* note 2, at 401 (O.R.), 589 (D.L.R.).

serious doubt about Rivard's intentions with respect to industry fund contributions: "The plaintiff well knew at all times that the defendant did not agree to pay such charges. . . ." ²⁹

Garrett J. then turned to a consideration of the *quantum meruit* claim. Clearly, no claim could be asserted with respect to the 1968 negotiations. Rivard had negotiated its own agreement with Local 71. A *quantum meruit* award would be appropriate for the 1971 and 1973 negotiations, in Garrett J.'s opinion, inasmuch as the defendant "probably by its conduct did permit the plaintiff to negotiate or to assist in negotiating the collective agreements for those two years." ³⁰ Although the significance of this acquiescence of the defendant in permitting the plaintiff to negotiate on its behalf is not spelled out precisely in Garrett J.'s reasons, it appears to be relied upon as a basis for inferring a promise to pay for the services rendered. Garrett J. characterized *quantum meruit* claims in the following terms:

A *quantum meruit* claim arises where work is done or services are performed by one person for another in circumstances which entitle the person doing the work or performing the services to receive a reasonable compensation therefor. Where no particular remuneration has been specified the law will infer a promise to pay a reasonable sum. ³¹

As in so much of the *quantum meruit* case law, the inherent ambiguity of the concept of "inferring" a promise is not clearly resolved in Garrett J.'s judgment. One may, of course, infer genuine or actual agreement from a particular set of circumstances. This does not appear to be what Garrett J. has in mind. The plaintiff's suggestion that there exists an agreement between the parties has already been rejected without hesitation. One may assume, therefore, that the inference of a promise is intended by Garrett J. as a mere fiction. An obligation is being imposed on the defendant—an obligation now generally referred to as restitutionary in nature—to pay for the services rendered by the plaintiff. To be sure, the fact that the defendant had acquiesced in the receipt of these services seems to have been an important factor for Garrett J. Acquiescence in the receipt of the services rendered does make it seem more just to require the defendant to pay for them. But the obligation to pay is imposed by Garrett J. on grounds of fairness rather than on the basis that the defendant could be said to have promised to pay for them.

In focussing on Rivard's acquiescence as a basis for imposing an obligation to pay, Garrett J. appears to invoke a well-established principle of the law of restitution to the effect that one who has "freely accepted" the benefit of services rendered is obliged to pay for them. Indeed, the *free acceptance* principle is the only conceivable explanation for the result in this case other than the view, advocated here, that the *Rivard* case is an illustration of the phenomenon of awarding restitutionary relief to self-serving intermed-

²⁹ *Id.*

³⁰ *Id.* Garrett J. did not believe that a sufficient factual basis had been established in the record to enable calculation of an appropriate amount. The plaintiff was permitted to take a reference to the Local Master for this purpose.

³¹ *Id.*

dlers who have generated spin-off benefits for third parties. To sustain this latter view, then, it is necessary to establish that the *free acceptance* principle cannot supply an explanation for the result in *Rivard*.

The *free acceptance* principle does frequently offer an explanation for the awarding of *quantum meruit* relief on the basis of the unjust enrichment principle. The essence of the principle, however, is that the benefit of services has been freely accepted in the knowledge that compensation is expected.³² It would be unjust to allow a recipient of beneficial services to escape liability when he has permitted or encouraged the provider of the services to incur the cost of their provision in the expectation that he would be remunerated for them. In the important Canadian authority on unjust enrichment, *Degelman v. Guaranty Trust*,³³ a nephew rendered certain personal services to his aunt under an agreement which was void for lack of formality. Hence, the nephew was not entitled to compensation in the agreed amount. The nephew was, however, entitled to *quantum meruit* relief. The aunt had freely accepted these services, knowing that the nephew expected remuneration for them. Services accepted on such a basis give rise to restitutionary duties so as to prevent the unjust enrichment of one party at the expense of another. On reflection, it becomes evident that this principle cannot assist the plaintiff in the *Rivard* case.

A critical element in the establishment of a cause of action on *free acceptance* grounds is the knowledge of the recipient that the services are to be paid for. It would be a complete answer to a claim premised on *free acceptance* to show that the defendant's view that compensation should not be paid was known to the plaintiff. This, of course, is the case in *Rivard*: "The plaintiff well knew at all times that the defendant did not agree to pay charges. . . ."³⁴ It was for this reason that Garrett J. easily dismissed the suggestion that liability could be imposed on contractual grounds. For the same reason, liability on the basis of *free acceptance* cannot stand. The irrelevance for liability purposes of Rivard's acquiescence in the role of the Association in negotiating the 1971 and 1973 agreements becomes all the more apparent if the context within which that acquiescence was apparently *sought* and *obtained* by the Association is examined. The Association was quite obviously not simply offering, in a disinterested manner, to act on behalf of Rivard in its negotiations with Local 71. It is very much in the interest of such employers' organizations to represent all of the employers with whom the union in question would otherwise bargain individually. Hence, the obvious virtue of accreditation schemes for employers. Prior to March of 1973, of course, the plaintiff association was not accredited. It does not require much reading between the lines of the brief factual glimpses offered in Garrett J.'s judgment to appreciate that the acquiescence attributed to Rivard must have arisen in the context of overtures from the Association

³² See, e.g., Goff and Jones, *supra* note 7, at 15-16, for an account of this principle.

³³ [1954] S.C.R. 725, [1954] 3 D.L.R. 785.

³⁴ *Supra* note 2, at 401 (O.R.), 589 (D.L.R.).

to let it include Rivard in the group for which it negotiated with Local 71. The Association wanted Rivard "on side." Thus Rivard's acquiescence in 1973 (prior to accreditation, it may be assumed) appears to have been somewhat grudging. Rivard allowed the Association to negotiate on its behalf in 1973 but only if Rivard could see the agreement before it was signed. Rivard would agree to throw in its lot with (and thereby strengthen) the Association's bargaining position but only if some ability to oversee the final product was offered in return. When viewed against the background of Rivard's continuing insistence that it would not contribute to the industry fund, it becomes apparent that Rivard's acquiescence in the bargaining role of the Association cannot serve as a foundation for restitutionary liability. Rivard's conduct does not constitute a free acceptance of services in the expectation that they are to be paid for. It is the reluctant acquiescence of one who relinquishes lone wolf status in favour of what others perceive to be the common good to be achieved by collective action but persists in refusing to contribute financially to its support.

If the *free acceptance* principle cannot provide a basis for restitutionary relief, is there an alternative basis for requiring Rivard to render restitutionary compensation for what would otherwise be a free ride in the collective agreement negotiations? Returning to the central theme of the modern analysis of restitutionary liability—unofficial conferral of a benefit—a strong argument can be made for recovery on the *Rivard* facts. On the question of officiousness, support may be drawn from the self-serving intermeddler case law. The plaintiff association, like an individual launching a creditors' suit or undertaking carriage of a class action, is generating spin-off benefits for Rivard in the course of pursuing its self interest or, more precisely, that of its membership. It is to be noted, however, that the Association is not merely conducting its own affairs with necessarily incidental spin-offs thereby created for the defendant. The Association is going a step further and actually acting as a representative of the defendant's interests. Moreover, it wishes to act in the representative capacity in order to strengthen its own bargaining position. If this were to be done without Rivard's consent, would this not amount to an officious intermeddling in Rivard's affairs? In responding to this objection, it is important to note that the representative role played by the Association is, after accreditation at least, specifically authorized by statute. Surely, the fact that the Association has been duly authorized pursuant to the provisions of a statutory scheme by the Ontario Labour Relations Board to act on behalf of employers such as Rivard is a complete answer to an allegation of officiousness. The Association has not engaged in an unjustified interference in the affairs of another. The enactment of the accreditation scheme was designed to facilitate interventions of this kind. With respect to the 1971 negotiations, however, the lack of accreditation deprives the Association of this line of analysis. Further, for reasons already discussed, the acquiescence of Rivard in 1971 cannot support a restitutionary claim. Although the acquiescence would establish lack of officiousness, it occurred in circumstances which clearly indicated that Rivard did not intend to pay for the Association's efforts on his behalf. It is to be noted, however, that Rivard's acquiescence is not material to the claim for the 1973 nego-

tiations. The unofficial character of the actions of the Association in 1973 is established on the basis of accreditation and is not dependent on the (otherwise claim defeating) acquiescence of Rivard.

If it is conceded that the intervention is unofficial, is it also the case that Rivard has received a benefit of a kind for which a duty to pay is normally imposed by restitutionary law? It is one thing to establish that the collective bargaining services of an accredited contractors' association are beneficial, in a general way, to the interests of the represented contractors;³⁵ quite another to determine that non-member contractors should be obliged to pay for benefits received in this form. Can Rivard not argue that it would prefer not to obtain the benefit of services thus thrust upon it? Moreover, how is the value of this benefit to Rivard to be assessed? An appropriate response to both of these objections is suggested by the prevailing practice in the industry of requiring contributions prorated to the extent of a particular employer's use of union employees.

The first objection draws on a concern with what was referred to in the earlier article as the problem of free choice.³⁶ It would be surprising and most unusual for a recipient of unrequested services to be required to pay for them unless (i) they could be said to have been necessary services thus constituting an expense the recipient would have borne in any event, or (ii) they have been turned to account by the recipient as, for example, where their product has been converted into a liquid asset. If the beneficial services do not meet these criteria, it may be argued that the imposition of liability interferes with the ability of the individual to invest his assets as he sees fit: "One cleans another's shoes. What can the other do but put them on?"³⁷ The problem here is only partly one of officiousness. We do not want to reward the uninvited shoe cleaner who seeks to profit by intruding in another's affairs. We also do not want to force an individual who is just as happy with dirty shoes to invest in their cleaning. Would Rivard's freedom of choice be unjustly invaded by the imposition of a duty to contribute to the cost of collective bargaining? In formulating a response to this question, it is important to note whether Rivard freely agreed to employ union labour or did so as a matter of necessity. If Rivard was free to choose whether or not to employ members of Local 71, his decision to do so can be fairly characterized as an affirmative decision to take advantage of the services rendered by the Association. The efforts of the Association created, in effect, a "product" or "asset" which was accessible to Rivard and could be utilized by it in order to carry out profit-making activity.³⁸ Once Rivard

³⁵ If Rivard could establish that the collective bargaining activities of the association were not beneficial to Rivard, this would be a complete answer to any claim on unjust enrichment grounds.

³⁶ McCamus, *supra* note 1, at 519-20.

³⁷ *Taylor v. Laird* (1856), 1 H. & N. 266, 156 E.R. 1203, 25 L.J. Ex. 329 at 332 (this particular quotation is not included in the H. & N. or E.R.) *per* Pollock C.B.

³⁸ *Cf. Ulmer v. Farnsworth*, 80 Me. 500, 15 A. 65 (1888). Discussed in McCamus, *supra* note 1, at 524-25.

has elected to do so, it does not offend the principle of free choice to require payment for the true cost. The non-liquid benefits of the representational activities of the Association have been turned to account by the decision of Rivard to use union labour in carrying out its revenue-generating activities. It is much more likely to have been the case, however, that non-union labour was effectively unavailable as an alternative for Rivard.³⁹ This fact would not weaken the argument for recovery by the Association. On the contrary, this would establish that the cost of collective bargaining was one which was inevitable for Rivard if it was to carry on in the construction business and, therefore, constitutes a benefit which should be the subject of restitutionary relief. To carry what would otherwise be an unavoidable expense of the other party is to confer an unequivocal benefit.

The industry fund arrangements are of particular significance in responding to the second objection adverted to above—the problem of quantifying the value of the benefit conferred. The quantification problem presents two dimensions here—to what extent has Rivard benefitted from these activities of the Association and what valuation should be placed on such benefits? The industry fund provisions are evidently accepted within the industry as an appropriate measure of the extent to which a particular employer has enjoyed the benefits of the collective bargaining process. Accordingly, this approach appears to offer a method of measuring the extent of the benefit derived for restitutionary purposes. The valuation of the benefit should be linked to the costs borne by the Association. This is not the case of a service being marketed by the Association for a fee. Clearly, however, non-members ought not be required to contribute to the cost of Association activities from which they derive no benefit. Accordingly, the pro-rated contribution should be discounted so as to reflect only a share of the cost of the Association's collective bargaining activities.

The availability of a workable measure of the value of the benefit received may serve to distinguish the *Rivard* facts from other free rider problems where collective action is taken by an association with consequent benefit not only to its membership but to non-members as well. Consider, for example, the intervention of a ratepayers group before a government body which succeeds in upsetting the adoption of a zoning by-law which would be detrimental to the value of residential properties in the affected neighbourhood. Consider the even more diffuse benefits flowing from a persuasive presentation of the Consumers' Association of Canada at, say, a Bell Canada rate hearing before the C.R.T.C. One possible reason for denying a claim brought by such an association against non-members on restitutionary grounds would be that the benefits in question are not calculable by any meaningful

³⁹ It is a reasonable assumption that the collective agreement negotiated with Local 71 would require employers such as Rivard with which it had apparently established bargaining rights to employ only union labour to perform the functions performed by members of Local 71.

measure.⁴⁰ In *Rivard*, such a measure has been established by practice within the industry.

One final objection to the granting of restitutionary relief on the *Rivard* facts could be premised on the absence of any reference in the statutory scheme to contribution by non-members to the funding of employers' associations. Should this be taken as evidence of legislative intent to deny associations a remedy of this kind? Given that Canadian labour relations legislation typically deals with a roughly analogous problem on the union side by specifically permitting compulsory "check-off" of union dues in "agency shop" or "Rand formula" provisions,⁴¹ is it not reasonable to interpret silence from the legislature on this point as a legislative judgment that compulsory contributions of this kind on the employer side are not warranted? It would appear that Garrett J. was not pressed with an argument along these lines. No reference is made to this problem in the *Rivard* judgment. Nonetheless, it is an objection which warrants serious consideration.

As a point of departure, it may be observed that legislative silence in itself would not normally be taken to be a very compelling indication that the operation of general private law principles is being swept aside by a statute. Admittedly, the relationship between private law *restitutionary* remedies and statutory schemes does not appear to have been the subject of much explicit discussion in the case law or the secondary literature. The relationship between statute law and the principles of liability of tort and contract, of course, is a more familiar subject of analysis. Contracts, arguably, is the more fruitful source of analogy. The heart of the problem in the restitutionary context is similar to that which arises in contract cases: should a cause of action which would otherwise arise at common law be allowed to subsist in the face of these particular statutory schemes? The analysis adopted in the

⁴⁰ See *supra* note 1, at 575. This is not to say, of course, that the value of the interventions of organizations such as the Consumers' Association ought not be considered to provide a rationale for adopting other means of financing them (e.g., by direct subsidy or costs awards in regulatory proceedings) which will indirectly require "free-riders" to contribute to their cost. See Trebilcock, *Winners and Losers in the Modern Regulatory System, Must the Consumer Always Lose?* (1975), 13 Osgoode Hall L.J. 619; Cons. Ass'n of Can., *Costs Awards in Regulatory Proceedings: A Manual for Public Participants* (Ottawa: Cons. Ass'n Can., 1980).

⁴¹ See, e.g., *The Labour Relations Act*, R.S.O. 1970, c. 232, s. 33(1)(a). The "Rand formula" provisions find their antecedent in an arbitration award of Mr. Justice Rand in which a compulsory check-off by the employer of union dues from the wages of all employees within the bargaining unit was granted. The unfairness which would otherwise result from permitting non-members of the union to gain a free-ride in the collective bargaining process at the expense of dues-paying union members was relied on by Mr. Justice Rand as a rationale for the award. See *Ford Motor Co. of Can. Ltd.* (1944), 46 C.L.L.C. ¶16,401.

As indicated above, *supra* note 21, the *Pacquet* case established that check-off provisions were "conditions of employment" which could be the subject of "collective bargaining" as these terms were defined in the Quebec *Labour Relations Act*. The express authorization of such provisions in the Ontario statute was intended to clearly indicate that such provisions did not contravene various provisions of the Act which secure certain rights to employees to freely decide whether to become union members. See *The Labour Relations Act*, R.S.O. 1970, c. 232, ss. 3, 58, 60.

"illegal" contracts context appears to offer a useful analytical model. In modern contract case law, the analysis begins from the assumption that private law contractual remedies will continue to subsist unless legislative intent to preclude their operation can be read into the scheme.⁴² In the absence of a clear statement in the statute, the central question of legislative intent is resolved by asking whether the objectives of the statutory scheme would be frustrated or undermined by the undeterred operation of private law contractual remedies. If no such harm results from contract enforcement, the normal principles are allowed to operate. A similar analysis in the restitutionary context would ask whether the operation of unjust enrichment remedies would have a deleterious effect on the accomplishment of the policy objectives of the statute. Where this is not the case, it would be presumed that such remedies were to be available in accord with general principle.

In the present context, recognition of the availability of an unjust enrichment remedy against non-members of employers' associations would not in any respect undermine the effectiveness of the statutory accreditation scheme. On the contrary, the recognition of such remedies would reduce the disincentives which a firm such as Rivard may see in joining such associations. The restitutionary remedy does not completely remove such disincentives. It may well be more attractive to Rivard to remain outside the Association and pay only a contribution to collective bargaining costs rather than to join the Association and pay the full industry fund contribution. In any event, even if the unjust enrichment remedy does not provide a complete solution to the Association's funding concerns, it does remove the unfairness of the non-members' free ride without in any respect undermining the operation of the accreditation provisions of the *Labour Relations Act*.

On the basis of general principle, then, we should conclude that any restitutionary remedies available to the employer's association at common law should subsist, unless the force of the Rand formula analogy is sufficient to lead to the conclusion that the legislature, by its silence, must have intended to deprive employers' associations of such remedies. Does the absence of a Rand formula provision adapted to the needs of the employers' associations offer a convincing basis for inferring that restitutionary remedies are precluded by the statute? There are a number of reasons for suggesting that this conclusion is not warranted.

First, there is no necessary connection between the non-availability of check-off rights and the non-availability of restitutionary remedies. The former envisages the deduction of certain payments at source. The latter envisages a cause of action enforceable by a direct suit against the unjustly enriched party. Leaving aside political or public relations considerations, resort to litigation by unions on unjust enrichment grounds would not be a practical means of securing contributions to the cost of their operations from

⁴² "A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or 'necessary inference,' as Parke B. puts it, that the statute so intended." *St. John Shipping Corp. v. Joseph Rank Ltd.* [1957] 1 Q.B. 267 at 288, [1956] 3 All E.R. 633 at 690, [1956] 3 W.L.R. 870 at 881 *per* Devlin J.

non-members. Check-off could not be accomplished at common law. Hence, a legislative decision to withhold or deny check-off rights does not speak directly to the availability of common law remedies. Moreover, there is no practical equivalent in the employers' context to the use of check-off rights. Under check-off, the union obtains the employers' cooperation in making deductions at source. It is not impossible to conceive of roughly analogous means of employing the co-operation of unions in coercing contributions from non-member employers. For example, unions might be asked to supply employees only to employers in good standing with the association. However, a scheme which utilized union action as a device for securing contributions from non-members of employer associations might well be considered unattractive by employers or legislators. Further, the legality of such a device may be open to question.⁴³ In any event, it is not surprising that no such policing function has been built into the accreditation scheme. Finally, it may be observed that the general problem of integrating private law remedies with statutory schemes raises questions of such subtlety that one might expect these questions would often be simply left to the courts for judicial resolution on the basis of general principle. This is no less true of restitutionary analysis and it will often be appropriate—and, arguably, is appropriate here—to conclude that legislative silence signals only that the matter has not been addressed by the legislature.

It may be argued, however, that in the context of an elaborate and detailed statutory scheme such as a labour relations law—the implementation of which is supervised by an administrative body and the amendment of which is not uncommon—the courts should be more willing than in other contexts to infer from silence that the legislature intends that nothing be done on the matter in question. Whatever the merits of this view, the intrusion of the unjust enrichment principle into the *Rivard* fact situation is quite defensible. In adopting a private law solution to the problem exemplified by *Rivard*, Garrett J. has added only a rather minor and undisturbing footnote to the labour relations scheme. The inability of the association to seek redress in any other manner was presumably not anticipated by those who drafted the accreditation scheme. Accordingly, invocation of the unjust enrichment

⁴³ "Combinations . . . of workmen or employees for their own reasonable protection as such workmen or employees" are exempt from federal anti-combines law. See *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 4 as am. by S.C. 1974-75-76, c. 76, s. 2. The issue here is whether action to further the interests of an employers' association would be protected by this provision. An argument favouring the legality of these arrangements would be that the desire of the union to place support of the employers association on the bargaining table constitutes a legitimate exercise in seeking favourable trade-offs with the association. Moreover, if the *Pacquet* analogy, *supra* note 21, is persuasive, the actions of the association in seeking such provisions may be protected by s. 41(1)(c) of the Act. So too, then, should union activity in support of these objectives be protected. For a useful account of the impact of American and Canadian anti-trust law on the reach of collective bargaining, see Backhouse, *Labour Unions and Anti-Combines Policy* (1976), 14 Osgoode Hall L.J.

Consider, further, the applicability of s. 61 of the *Labour Relations Act*, R.S.C. 1970, c. 232: "No . . . trade union . . . shall seek by intimidation or coercion to compel any person to become . . . a member of . . . an employers' organization. . . ."

principle may be seen to effect a useful, albeit partial, solution to a problem resulting from an inadvertent lacuna in the statutory scheme.

In summary, the fact situation exemplified by *Rivard* offers another context within which a strong argument can be made in support of restitutionary recovery for the self-serving intermeddler. Although the analysis put forward by Garrett J. in the *Rivard* judgment does not withstand critical scrutiny, the result in the case can be supported on the basis of modern restitutionary analysis. An implication of this analysis of interest to the construction industry is that it would appear to provide a basis for imposing a more general duty on contractors who do not join employers' associations to contribute to the costs incurred by such associations in their bargaining activities than was envisaged by Garrett J. in *Rivard*. The fact that an association has been accredited under provincial labour relations legislation should be taken to establish that the association's representation of non-members is unofficious. The use of union workers by non-member employers will provide a basis for holding that a benefit has been conferred. The industry fund provisions developed by the industry point to an acceptable method of measuring the extent of the benefit conferred on a particular contractor which should facilitate the calculation of an appropriate restitutionary award.

